

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 038181-97

Robert E. Lee
General Investment and Development
Travelers Insurance Co.

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy and Horan)

Edward D. Murphy, Esq., for the employee
Maureen H. McManus, Esq., for the insurer at hearing
Beth R. Levenson, Esq., for the insurer on appeal

CARROLL, J. The employee appeals from a decision in which an administrative judge denied his claim for temporary total incapacity benefits. The judge concluded that the employee had not met his burden of proving a worsening of his medical condition, for which the insurer was paying partial incapacity benefits at the time of the hearing. Because the judge misapplied the law under the circumstances of this case, we reverse the decision and recommit the case.¹

The employee injured his neck at work on August 15, 1997. (Dec. 2.) After a § 10A conference on March 20, 1998, a different administrative judge ordered the insurer to pay a closed period of § 34 benefits and ongoing § 35 benefits.² The insurer initially appealed the conference order, but on November 8, 1999, withdrew the appeal after receipt of the § 11A physician's report. On September 6, 2000, the insurer filed a complaint to discontinue the employee's partial incapacity benefits being paid pursuant to

¹ As the administrative judge who decided the case no longer serves with the department, the recommitment will be for a hearing de novo.

² We take judicial notice of the 1998 conference order and various other departmental forms located in the board file, as the judge's recounting of the procedural history of the case is inaccurate. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002) (reviewing board may take judicial notice of documents in the board file).

the 1998 conference order, based on a § 45 medical examination. The employee joined a claim for § 34 benefits. As a result of the § 10A conference, yet another administrative judge declined to modify – in favor of either the insurer or the employee – the § 35 benefits being paid since 1998. The employee appealed that order, and the case came to a full evidentiary hearing before the present administrative judge. (Dec. 2.)

In support of her denial of the employee's claim for § 34 benefits, the judge found, "that the employee has not shown that his condition has worsened since the order of § 35 benefits." (Dec. 7.) Insofar as this finding is at the heart of the judge's incapacity assessment, we need go no further. The finding establishes a burden for the employee's proof of his claim that he is not required to shoulder. Accordingly, we reverse the decision.

It is true that, in order to support a change from partial to total incapacity benefits, an employee must prove a worsening in his medical condition, see Foley's Case, 358 Mass. 230, 232 (1970), or in external vocational factors under Scheffler's Case, 419 Mass. 251, 256 (1994). See Buonnano v. Greico Bros., 17 Mass. Workers' Comp. Rep. 91, 94-95 (2003). However, the rule only applies when the partial benefits were ordered in a hearing decision on the merits of the employee's claim. "At the root of the reasoning of the court in Foley's Case, supra, . . . is the proposition that res judicata applies to workers' compensation proceedings." Buonnano, supra at 94 (footnote omitted). As we stated in Payton v. Foster Forbes Glass Co., 11 Mass. Workers' Comp. Rep. 627 (1997), a case directly apposite to that on review:

In this case, the judge erred in requiring the employee to prove that his condition worsened after the unappealed conference order to qualify for compensation. See Hendricks [v. Federal Express], 10 Mass. Workers' Comp. Rep. 660, 662 (1996); Gaetani v. Fl[uo]rs Constructors Inc., 7 Mass. Workers' Comp. Rep. 384, 386 (1993); see also Foley's Case, 358 Mass. 230 (1970); Pernorio v. ARA Smith Transfer, 8 Mass. Workers' Comp. Rep. 304, 305 (1994). Here, the § 10A conference order was conclusory and the proceeding itself was not held to the rules of evidence. It thus contained no "findings" on the extent of incapacity from which a "worsened" medical condition could be determined. Compare 452 Code Mass. Regs. 1.10(1) with 1.11(5)(conferences are "informal" and "not . . . subject

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to the rules of evidence” while hearing decisions are “based solely on the evidence introduced at hearing.”)

Payton at 629.

Because the payment of § 35 benefits was pursuant to an unappealed conference order, the judge’s imposition of the burden of showing “worsening” under Foley’s Case was contrary to law. See § 11C. Cf. Glowinkowski v. KLP Genlyte, 18 Mass. Workers’ Comp. Rep. ____ (August 17, 2004).

Accordingly, we reverse the decision and transfer the case to the senior judge for reassignment and a hearing de novo. See footnote 1, supra.

So ordered.

Martine Carroll
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: **August 31, 2004**

Mark D. Horan
Administrative Law Judge